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## Canadian State Trials, vol. 1

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# Critical Notices

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Michael Boudreau\*

Justice or Repression?: Canadian  
State Trials and the Rule of Law

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[Review of F.M. Greenwood & B. Wright, eds., *Canadian State Trials, Volume I: Law, Politics and Security Measures, 1608-1837* (Toronto: University of Toronto Press, 1996)]

In a letter to Deputy Judge Advocate Charles Gould, dated 10 April 1762, General Thomas Gage, Commander-in-Chief of British forces in North America, wrote with regard to the proceedings of the general courts martial in Montréal that “it is a Maxim held by all Civilians That no government can subsist without Law.”<sup>1</sup> Over half a century later in Bay Roberts, Newfoundland, William Elenes filed an affidavit with the Harbour Grace Sessions Court alleging that a group of men stole some potatoes from his house. “Late in March of [1817],” the statement read, “John McGrath with a gun and two men came to [Elenes’] house asking for potatoes. Twenty-one or 22 men armed with guns and sticks stood a short distance off.” According to Elenes, he told McGrath that “I had no potatoes on my own room but what my own family required.” Elenes then asked McGrath if he “had any authority for acting as he was doing and why a Constable had not come with him.” McGrath apparently replied that “they were authority enough . . . and had no need of a Constable.” These men then proceeded to take two barrels of potatoes, but after Elenes had protested they took only one barrel. When Elenes tried to thwart their efforts for a second time, “one of the gang seized me by the throat and would have strangled me but for the assistance of my wife.”<sup>2</sup>

These two seemingly disparate episodes in the colonial history of British North America underscore the paradox inherent in the rule of law. The rule of law organizes social relations by embedding within civil society a framework of authority to which everyone is bound to adhere. In conjunction with the state, the law maintains a social order character-

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1. F.M. Greenwood & B. Wright, eds., *Canadian State Trials, Volume I: Law, Politics and Security Measures, 1608-1837* (Toronto: University of Toronto Press, 1996) at 622 [hereinafter *State Trials*].

2. *Ibid.*, at 648-649.

ized by domination and class conflict.<sup>3</sup> The rule of law thus refers to the regulation of the social order by the legal order.<sup>4</sup> General Gage's comments alluded to this fact by highlighting an eighteenth-century belief that the "Law" was essential to the stability of the state and the preservation of law and order.

However, the power wielded by the rule of law is not absolute. Rather, and herein lies the contradiction, it rests upon the appearance, not the reality, of "equality before the law." By appearing to be just and removed from gross manipulation, the rule of law commands voluntary compliance from most sectors of civil society.<sup>5</sup> Yet formal judicial equality, by ignoring unequal class, gender and ethnic relations, perpetuates existing socio-economic inequalities.<sup>6</sup> In other words, the rule of law is fraught with inconsistencies, thereby allowing it and "justice," as William Elenes can attest, to be usurped. Given this, the question may be asked of the law, both in the past and the present, "whose interests does it serve?"

The editors of *Canadian State Trials, Volume I*, address this tension which exists within the rule of law. However, F. Murray Greenwood and Barry Wright, along with the contributors to this volume, do not explain, in the context of "state trials," how the contradictory nature of the rule of law shaped the implementation and social meaning of justice. It is upon this point concerning the rule of law that this review essay will focus to critique Volume I of *Canadian State Trials*. This review will also assess the overall themes of each article and the book itself to reveal the importance of the subject of state trials to historians and legal scholars. In addition, it will suggest some revisions, arising out of the difficulties with this volume, that need to be seriously considered for future volumes.

This book is the first instalment in a planned six-volume project dedicated to exploring state trials in Canada. Under the auspices of the Osgoode Society for Canadian Legal History and published in conjunction with the University of Toronto Press, this series will be indispensable

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3. D. Sayer, *The Violence of Abstraction: The Analytic Foundations of Historical Materialism* (Oxford: Basil Blackwell, 1987) at 107-110; E.P. Thompson, *The Poverty of Theory & Other Essays* (London: Merlin, 1978) at 96.

4. E. Colvin, "Criminal Law and the Rule of Law", in P. Fitzgerald, ed., *Crime, Justice and Codification: Essays in Commemoration of Jacques Fortin* (Toronto: Carswell, 1986) at 127-129.

5. *Ibid.* at 136; D. Hay, "Property, Authority and the Criminal Law", in D. Hay *et al.*, eds., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Penguin, 1975) at 33; E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York: Pantheon, 1975) at 263.

6. A. Bartholomew & S. Boyd, "Toward a Political Economy of Law", in W. Clement & G. Williams, eds., *The New Canadian Political Economy* (Kingston: McGill-Queen's University Press, 1989) at 229.

to any nuanced understanding of the legal, social and political history of Canada. Volume I covers the period from the establishment of Québec in 1608 to the onset of the rebellions in Upper and Lower Canada in 1837. The state trials associated with these rebellions will be dealt with in Volume II. An assortment of legal scholars, historians and archivists who specialize in this era have written seventeen articles, arranged chronologically, on specific state trials, the incidents which sparked them and their legal ramifications.

The focus of this series, "state trials," is a broad, yet overlooked subject in Canadian legal and social history. A "state trial," Greenwood and Wright contend, may be generally defined as "any trial in which the political interests of government were specifically . . . engaged." This can include issues such as national security, political corruption, federal/provincial disputes over jurisdiction and native land claims. State trials have also been held to determine the guilt or innocence of those persons accused of committing offences against the state, whether of a political nature or a threat to the security of the state. Moreover, state trials underscore the power that the state can wield, for instance suspending habeas corpus, in the pursuit of "justice."<sup>7</sup> It is from these perspectives that *Canadian State Trials* attempts to assess the character of the law and politics in colonial British North America.

A unique and welcomed addition to this volume are the detailed appendices. In the first two, Patricia Kennedy provides a common-sense strategy for researching the history of state trials. She then outlines the archival locations of the most pertinent manuscript collections.<sup>8</sup> The third appendix, "Supporting Documents", reproduces the relevant primary document(s) for each chapter.<sup>9</sup> This section conveys to readers the historical richness of legal records and provides them with the opportunity to compare the authors' conclusions with some of the sources of their information; a rare privilege indeed.

Volume I of *Canadian State Trials* stands at the crossroads of three fields of historical scholarship: legal, criminal justice and social. All three have yet to reach an historiographical consensus on methodology and relevancy. Legal and criminal justice history have recently established a niche within Canadian historiography. With the publication in 1995 of *Law, Society and the State: Essays in Modern Legal History*, legal

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7. F.M. Greenwood & B. Wright, "Introduction: State Trials, the Rule of Law and Executive Powers in Early Canada", in *State Trials*, *supra* note 1 at 10-11 [hereinafter "Introduction"].

8. P. Kennedy, "Approaching an Iceberg: Some Guidelines for Understanding Archival Sources Relating to State Trials" and "Note on Sources" in *State Trials*, *supra* note 1 at 577-595.

9. This appendix covers 136 pages of text. *State Trials*, *supra* note 1 at 596-732.

history, once considered a marginal part of Canadian history, has, in the words of David Sugarman, "come of age."<sup>10</sup> Legal history was characterized by narrowly focused examinations of the law, its development, and the impact it had on specific individuals or institutions.<sup>11</sup> This concentration tends to ignore the larger socio-economic milieu which impinges upon the creation and interpretation of the law. Legal history is now marked, in the view of Louis A. Knafla and Susan W.S. Binnie, by an interest in how law and the state are informed by race, gender, class and culture.<sup>12</sup>

Where legal history has diverged from criminal justice history is the importance it attributes to the history of crime. Some legal historians view crime as a rather incidental element of the law and therefore give it little attention.<sup>13</sup> Criminal justice history, however, tries to illustrate the centrality of crime to the definition and functioning of the law. Some social historians have turned their attention to crime and criminal justice as a means of comprehending the organization of capitalist social relations. Such themes as criminality, state formation, punishment and incarceration, and police and law enforcement, form the parameters of criminal justice history.<sup>14</sup> Much of the work in criminal justice history has dealt with the nineteenth century. As a result, these issues are in need of serious exploration in the context of the twentieth century.<sup>15</sup>

Despite the advancements made by legal and criminal justice history, most social historians continue to overlook the law. While there are exceptions to this rule, notably the work of Karen Dubinsky, Tina Loo and Carolyn Strange, in general the law and its various institutional and social components are not perceived by most social historians in Canada

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10. L.A. Knafla & S.W.S. Binnie, eds., *Law, Society and the State: Essays in Modern Legal History* (Toronto: University of Toronto Press, 1995) at ix [hereinafter *Law, Society and the State*].

11. For examples of this trend see D.H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University of Toronto Press, 1989); and D.J. Bercuson & L.A. Knafla, eds., *Law and Society in Canada in Historical Perspective* (Calgary: The University of Calgary Press, 1979).

12. *Law, Society and the State*, *supra* note 10 at 4. The most recent commentary on the state of legal history in Canada is made by Jim Phillips in "Recent Publications in Canadian Legal History" (1997) 78:2 Can. Hist. Rev. 236.

13. B. Young, "Law 'in the round'" (1986) 16:1 *Acadiensis* 155 at 159-160; G. Marquis, "Law, Society and History: Whose Frontier?" (1992) 21:2 *Acadiensis* 162 at 174.

14. Most of these themes are covered in J. Phillips, T. Loo & S. Lewthwaite, eds., *Essays in the History of Canadian Law* vol. 5 (Toronto: University of Toronto Press, 1994).

15. This point is also made by J. Phillips, "Crime and Punishment in the Dominion of the North: Canada from New France to the Present", in C. Emsley & L.A. Knafla, eds., *Crime History and Histories of Crime: Studies in the Historiography of Crime and Criminal Justice in Modern History* (Westport: Greenwood Press, 1996) at 180-181.

to be integral to the course of Canadian history.<sup>16</sup> But they most certainly are. The law, both criminal and civil, along with its formation, enforcement and the opposition it generates, particularity crime, shapes class, gender and ethnic relations and identities. Nevertheless, the law, in all its historical dimensions, has not made a dramatic impact upon the writing of Canadian history.

One of the main reasons for this are the shortcomings found in legal and criminal justice histories. Both are relatively devoid of critical theory and a broader socio-economic setting. The law impinges upon and serves to legitimize capitalist society and its concomitant inequalities. Moreover, the rule of law, as a hegemonic ideology, is defined in part by ongoing political, economic and cultural struggles, all of which are driven by the individuals who engage in these conflicts. In failing to grapple with these issues, legal and criminal justice history, regardless of their achievements, will remain marginalized within the realm of Canadian historiography.<sup>17</sup> This is the dilemma facing the *Canadian State Trials* project. Without engaging some of the larger questions associated with the law and state trials, this and successive volumes will find it increasingly difficult to exert their relevance beyond the confines of legal scholarship.

The Introduction to Volume I is the crux of this problem. "State Trials, the Rule of Law and Executive Powers in Early Canada", co-authored by F. Murray Greenwood and Barry Wright, provides an overview of the main themes contained in this volume, specifically: how colonial courts served as important political battlefields, the prominence of the law in constitutional debate and social conflict, the interpretation and application of the law, the notion of judicial independence, and how the language of the British constitution and "British justice" permeated the social and political landscape of British North American society. Greenwood and Wright also stress that the Atlantic colonies are strongly represented in this volume. With seven of the seventeen chapters devoted to the Atlantic region, this volume acknowledges the importance of and makes a significant contribution to the eighteenth- and early-nineteenth-century history of Atlantic Canada.

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16. K. Dubinsky, *Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1929* (Chicago: The University of Chicago Press, 1993); T. Loo, *Making Law, Order and Authority in British Columbia, 1821-1871* (Toronto: University of Toronto Press, 1994); and C. Strange & T. Loo, *Making Good: Law and Moral Regulation in Canada, 1867-1939* (Toronto: University of Toronto Press, 1997).

17. While the historiography of the law, crime and criminal justice in Europe and the United States has made greater strides in comparison to Canada, it is still, as Louis A. Knafla notes, "relatively underwritten." L.A. Knafla, "Structure, Conjuncture and Event in the Historiography of Modern Criminal Justice History" in C. Emsley & L.A. Knafla, eds., *supra* note 15 at 33 [hereinafter "Structure, Conjuncture and Event"].

The editors try to come to terms with the meaning of “state trials” and the thorny question of the reception of British law in the colonies. It is here, however, where the Introduction is weakest. By employing an all-inclusive definition of what constituted a “state trial”, essentially any act that could undermine state security and public order, the editors and contributors have endeavoured to “highlight an ongoing tension between the rule of law and the discretionary exercise of executive measures and reveal something about the role of the law in the exercise of power.”<sup>18</sup> There are two serious drawbacks to this approach. Firstly, not every essay comments directly on this tension or how the law was employed as a symbol of state power. Whether or not the state trials examined in this volume were acts of “justice” or repression is a fundamental point, which is not made clear, about how British North Americans perceived the law and its operation.

Secondly, the broadness of the definition of “state trials” complicates rather than clarifies one’s understanding of how the state and the law worked during this period of Canadian history. If a state trial could be convened for anything from military treason to seditious libel, the assumption is that the state and the law were all-pervasive institutions which acted in a rational and calculated fashion. Such, however, was not the case, especially in the formative years of 1608 to 1837, for either the state or the law. Instead, both functioned with a degree of relative autonomy and often in a haphazard manner.<sup>19</sup> This shortcoming is compounded by the absence of a clear conceptualization of the “state” itself. Without a sense of what and who comprised the “state” and how it and the law changed from 1608 to 1837, the full impact that state trials had upon the development of Canada’s political and legal culture, as well as the justice system, is lost.<sup>20</sup> If this problem is not resolved, future volumes will be unable to properly assess the transformation that the state and the law underwent with the rise of capitalist modernity.

Another contentious part of the Introduction is the lengthy discussion of the reception of British law in each colony and its effect on colonial law. Greenwood and Wright should be commended for broaching such

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18. “Introduction”, *supra* note 7 at 9.

19. For more on the relative autonomy of the state and the law see G. Albo & J. Jenson, “A Contested Concept: The Relative Autonomy of the State”, in W. Clement & G. Williams, eds., *supra* note 6 at 180-211.

20. The nature of the colonial state is discussed in A. Greer and I. Radforth, eds., *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada* (Toronto: University of Toronto Press, 1992). A useful historiographical commentary on nineteenth-century state formation is P. Burroughs, “State Formation and the Imperial Factor in Nineteenth-Century Canada” (1996) 24:1 *J. Imperial & Commonwealth Hist.* 118.

a complex issue. Ironically, they fail to demonstrate the historical importance of reception in relation to how state trials unfolded and the general administration of the law in British North America. The exercise of the criminal and civil law hinges upon external as well as internal socio-economic factors.<sup>21</sup> Hence the need to evaluate which version of the law, English or French, the colonies adopted and how they modified it to suit local circumstances. Unfortunately, this point is not fully developed by Greenwood and Wright, leaving the centrality of reception undetermined. Similarly, most of the essays do not mention the issue of reception. Thus it must be assumed that reception was not a serious problem for colonial administrations. While each chapter discusses many of the key elements of state trials, as a whole *Canadian State Trials* is a disjointed book due to its lack of a strong organizational framework.

The sheer breadth of some of the articles in this volume is evident in the opening piece by Peter N. Moogk. "The Crime of Lèse-Majesté in New France: Defense of the Secular and Religious Order" is a brief statistical evaluation of state trials in New France and local forms of resistance towards the imposition of order. In *ancien régime* France, crimes perpetrated against the state, "*lèse-Majesté humaine et divine*", also struck a blow at the Roman Catholic Church. French criminal law viewed and protected the monarchy and the church as one institution. Both stood at the apex of a sacred hierarchy of order, occupations and individuals that the law enshrined. This class-based society formed the backbone of the *bonne ordre* which magistrates and public officials adhered to and enforced. As Moogk notes, this ethos figured prominently in the social and legal discourse of New France as the colony struggled to maintain a sense of social order.<sup>22</sup>

Without legal restraints, it was felt, society would erupt into anarchy. This belief, as Moogk notes, sanctioned the sometimes swift and harsh punishment meted out to offenders. As the eighteenth century dawned *lèse-Majesté* consisted mainly of secular offences, including petty treason and sedition. Residents of New France did not always passively accept the iron will of the law. Opposition to public executions, hindering legal officials in the course of their duties and a general defiance of authority, what Moogk describes as "*la rebellion a justice*", characterized legal and social relations in New France. This in turn prompted some magistrates to hand out lenient sentences to calm the waters of protest and ensure a semblance of legitimacy for the justice system. While this article

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21. "Structure, Conjuncture and Event", *supra* note 17 at 39.

22. P.N. Moogk, "The Crime of Lèse-Majesté in New France: Defence of the Secular and Religious Order", in *State Trials*, *supra* note 1 at 55-71.



does not deal with the precise workings of state trials, Moogk nevertheless underscores the dialectic relationship between the law and civil society.

In comparison to Moogk's sweeping analysis, Barry Cahill's "The 'Hoffman Rebellion' (1753) and Hoffman's Trial (1754): Constructive High Treason and Seditious Conspiracy in Nova Scotia under the Stratocracy" is a more finite study of a single state trial. Cahill meticulously reconstructs Hoffman's trial and eventual conviction for seditious conspiracy. In what Cahill describes as a "gross miscarriage of justice", the General Court fined Hoffman 100 pounds sterling, sentenced him to two years imprisonment and then banished him from the colony.<sup>23</sup> Hoffman, one of the "Foreign Protestants" who came to Nova Scotia in 1753 and settled in Lunenburg, was arrested as the ringleader of a putsch initiated in 1753 by German settlers angered by a rumour that supplies destined for their settlement had been waylaid at Halifax.

Hoffman first faced a charge of treason. But when the grand jury, in a show of protest over state policy and corruption, overturned the charge, the government ordered that a charge of seditious conspiracy be laid against Hoffman. Cahill's article deftly shows that the ideal of judicial independence in colonial Nova Scotia remained just that, an ideal. Moreover, the Hoffman trial sheds further light on the political animosities between the Halifax oligarchy and those groups within the province opposed to what they saw as centralized, autocratic rule by the government. What Cahill's work does not address, however, is the wider socio-economic context and the religious turmoil involving "churchmen" and "dissenters" which helped to mould political and legal decisions in Nova Scotia. In the absence of this background, the Hoffman case, while important, still seems to be an isolated incident in the larger scheme of Atlantic Canadian legal and social history.

Thomas Garden Barnes' "'Twelve Apostles' or a Dozen Traitors? Acadian Collaborators during King George's War, 1744-8", is akin to Cahill's "Hoffman Rebellion" in that it too makes some salient points about the nature of politics and the law in Acadia. This article adds a new dimension to the history of the Acadian deportation. In the years immediately preceding the expulsion of the Acadians in 1755, Major Paul Mascarene, the surrogate governor of Nova Scotia (1739-1749), felt convinced that if treated fairly the Acadians would have no cause to rebel

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23. B. Cahill, "The 'Hoffman Rebellion' (1753) and Hoffman's Trial (1754): Constructive High Treason and Seditious Conspiracy in Nova Scotia under the Stratocracy", in *State Trials*, *supra* note 1 at 72-97.

against the English. This outlook was put into practice when twelve Acadians, tried for collaborating with French invaders during the course of King George's War, did not hang for their crime. By not bringing the full force of the law to bear upon these twelve "traitors", Barnes argues, Mascarene and the Executive Council reaffirmed the legitimacy of English law and British control over the colony. It also kept the Acadians, albeit unofficially, neutral.<sup>24</sup>

This article pinpoints some of the difficulties imperial authorities had implementing the law in a colonial milieu. Mascarene seemed well aware of the problems he faced trying to apprehend all of the potential Acadian "traitors" and sorting through the logistics of their trials. Almost as a compromise Mascarene refused to execute the guilty parties, thereby evoking the leniency of British law. However, under the governorship of Charles Lawrence (1753-1760), the rules of the game changed. As Barnes contends, the rule of law and the preservation of peace, order and good government meant but one thing to Lawrence *vis-à-vis* the Acadians: expulsion. This point should not be ignored by those historians concerned with evaluating the legal and political justifications for expelling the Acadians. Barnes could have gone one step further and depicted Lawrence's actions as a product of what F. Murray Greenwood, in relation to Lower Canada, has called a "garrison mentality."<sup>25</sup> From this perspective, the Acadians fell victim to a rigid interpretation and strict enforcement of the law.

"Civilians Tried in Military Courts: Québec, 1759-64", by Douglas Hay, investigates similar examples of ad hoc justice. In the interim between the downfall of Québec and the solidification of the British state, military courts served as the only medium for formally dispensing criminal justice. Hay has unearthed approximately fifty cases of civilians tried before these courts for criminal wrongdoing in this six-year time span. According to the letter of the law civilians could not be subjected to military law. Yet as Hay skilfully demonstrates, this fact was ignored or given little credence by local officials due to the unsettled nature of civilian justice in Québec.<sup>26</sup> This judicial practice generated a storm of

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24. T.G. Barnes, "'Twelve Apostles' or a Dozen Traitors? Acadian Collaborators during King George's War, 1744-8", in *State Trials*, *supra* note 1 at 98-113.

25. F.M. Greenwood, "Judges and Treason Law in Lower Canada, England and the United States during the French Revolution, 1794-1800", in *State Trials*, *supra* note 1 at 241-295 [hereinafter "Judges and Treason Law"]. For an insightful critique of the "garrison mentality" thesis see P. Burroughs, "'The Garrison Mentality' versus 'La Survivance': English-French Relations in Lower Canada, 1791-1838" (1996) 24:2 J. Imperial & Commonwealth Hist. 296.

26. Douglas Hay, "Civilians Tried in Military Courts: Québec, 1759-64", in *State Trials*, *supra* note 1 at 114-128.

controversy amongst those Montréal merchants tried for insulting army officers. In effect, "British justice", the right to a fair and impartial trial, had been sacrificed in the name of social order and military honour.<sup>27</sup>

By their very nature, these courts, in Hay's words, "raised political passions in Québec" and trampled civil liberties. Illegal arrests and denying some prisoners the right to bail were a few of the alleged injustices carried out by Québec's military courts. In Hay's estimation these courts became a focal point of debate over civilian and military notions of justice and freedom. The question of who represented the "civilian" side of this equation is problematic. Did the two women in the case files, a "negro woman" and a "negro slave", in addition to the French civilians brought before the military courts, receive the same or worse treatment as the English merchants portrayed by Hay? The class, gender and ethnicity of the accused could indeed have altered the extent and meaning of judicial tyranny in the military courts of post-Conquest Québec.

Jean-Marie Fecteau and Douglas Hay continue this theme of military (in)justice in "'Government by Will and Pleasure Instead of Law': Military Justice and the Legal System in Québec, 1775-83." Constitutionally, two treasured elements of British liberty were trial by jury and habeas corpus. Many residents of Québec did not believe that these fundamental rights were in effect in the colony. In response, a binational alliance emerged which demanded that all citizens of Québec be granted the constitutional protection enjoyed by English persons. The British did institute habeas corpus for criminal cases in Québec in 1764 and for civil cases in 1785. These measures and the entire British legal system existed alongside, and in conflict with, French civil law.<sup>28</sup> Fecteau and Hay hint at the distemper and potential for unity that this situation caused, but they do not fully explore the social and ethnic friction reflected in and created by these competing institutions.

The outbreak of the American Revolution and the fears it stirred amongst British military rulers shattered the fragile veneer of "British justice." As Fecteau and Hay note, the wrongful imprisonment of at least twenty-five men for suspected treason is indicative of the fact that justice and constitutional rights could easily be suspended by imperial authori-

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27. The concept of "British justice" is best explained by G. Marquis, "Doing Justice to 'British Justice': Law, Ideology and Canadian Historiography", in W.W. Pue and B. Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) at 43-69.

28. For more on the tensions between these two distinct national legal systems see E. Kolish, "Some Aspects of Civil Litigation in Lower Canada, 1785-1825: Towards the Use of Court Records for Canadian Social History" (1989) 70:3 *Can. Hist. Rev.* 337.

ties bent on preserving order and loyalty in the midst of war.<sup>29</sup> Fecteau and Hay trace the treatment accorded four of the twenty-five men apprehended by the British army. Fleury Mesplet, Valentin Jautard, Charles Hay and Pierre Du Calvet were held against their will, denied bail, never formally charged or tried for their alleged crimes and released only after the war with the Thirteen Colonies ended. Such actions on the part of the state, as Fecteau and Hay aptly show, fostered a critique of the use of executive powers which in turn laid some of the groundwork for future political reform movements in Lower Canada. It also circulated doubts about the hegemonic stability of English freedom and constitutionality in Québec. While these are seminal conclusions, the fact that an actual state trial does not appear in this article reinforces the need for the editors to have precisely identified the criteria for state trials.

State repression in a climate of military confrontation is echoed by Ernest A. Clarke and Jim Phillips in "Rebellion and Repression in Nova Scotia in the Era of the American Revolution." The government of Nova Scotia employed a number of informal strategies to curb rebellious sentiment in the colony. Confiscation or destruction of property and seizure of cattle, while resorted to by the state in only a few cases, still sent a message, Clarke and Phillips maintain, to would-be rebels to remain loyal to the British Crown or suffer the consequences. The Eddy Rebellion of 1776 and the subsequent siege of Fort Cumberland by a band of "Yankee rebels", serves as the backdrop to Clarke and Phillips' study of colonial law in action. After the dust had settled and the British had foiled the rebels' plans to take control of the fort, the government had to deal with those residents suspected of sympathizing with the Americans.

The authorities adopted a two-pronged approach to settling this matter. Firstly, they tried and convicted two men for high treason. This, according to Clarke and Phillips, allowed the state to demonstrate its resolve to protect the colony, a mind-set reminiscent of a "garrison mentality." Moreover, with mistrust over the colony's oligarchic government widespread within the province, provincial officials had to display a measure of tolerance and their faith in the general populace that they would stay true to the British flag. Secondly, in what Clarke and Phillips call the "privatization of repression", the government supported the civil actions launched by Loyalists to seek compensation for the losses they had

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29. J. Fecteau & D. Hay, "'Government by Will and Pleasure Instead of Law': Military Justice and the Legal System in Québec, 1775-83", in *State Trials*, *supra* note 1 at 129-171.

suffered during the rebellion.<sup>30</sup> In so doing, the colonial government had moved the fight against its political enemies into the judicial arena. "Rebellion and Repression in Nova Scotia in the Era of the American Revolution" is a vital addition to the debate surrounding Nova Scotia's "neutrality" during the American war for independence and the varied meanings of "loyalty." Similarly, while highlighting the paradox of the rule of law in this context and how it informed the government's decisions, Clarke and Phillips do not comment upon the social and class conflict in the colony and its bearing upon the implementation of the law for political gain and social power.

D.G. Bell's "Sedition among the Loyalists: The Case of Saint John, 1784-6" provides another example of how the law and loyalty were used to extinguish dissent. New Brunswick's governing elite included state trials in their strategy to intimidate their political opponents. In 1786 the government passed a statute restricting political petitioning. This curtailed public debate and limited many citizens' access to the political process. A few, however, chose to protest this apparent outrage. Two printers (William Lewis and John Ryan), along with four others who signed a petition in opposition to this law, went on trial for seditious libel. The court convicted and fined all six men. The loyalty cry, as a hegemonic device, in Bell's assessment, gave the government carte blanche to deal with those who challenged its authority.<sup>31</sup> Bell's article adds further weight to the argument that the Loyalist leadership in New Brunswick was not a united body, but rather one riddled with internal rivalries. Missing from Bell's discussion is an assessment of how this use of state repression in Saint John may have formed the basis of future political reform movements, particularly at a time when Saint John was still in the initial stages of socio-economic and political evolution.

Elite fear of popular anarchy and disloyalty thrived within the minds of many prominent Englishmen in Lower Canada. F. Murray Greenwood's "Judges and Treason Law in Lower Canada, England and the United States during the French Revolution, 1794-1800" formulates the idea of a "garrison mentality." Greenwood points out that paranoia among the English bourgeoisie in Lower Canada over internal security peaked at the time of the French Revolution. One way to expose this attitude is to

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30. E.A. Clarke & J. Phillips, "Rebellion and Repression in Nova Scotia in the Era of the American Revolution", in *State Trials*, *supra* note 1 at 172-220. This article is part of a larger study by E.A. Clarke, *The Seige of Fort Cumberland 1776: An Episode in the American Revolution* (Kingston & Montréal: McGill-Queen's University Press, 1995).

31. D.G. Bell, "Sedition among the Loyalists: The Case of Saint John, 1784-6", in *State Trials*, *supra* note 1 at 223-240.

scrutinize, as Greenwood does, judicial behaviour in treason trials. Greenwood also provides a concise history of treason law in Lower Canada, England and the United States, as well as a window into the differing judicial practices and legal traditions in each country. As Greenwood astutely observes, by interpreting and evaluating the cases before them, judges construed, if not constructed, the substantive law, often with profound results.

This article delineates two ideological perspectives from which to consider judicial decisions: “Baconian” and “Cokean.” The former approach sided with the views of the executive power in spite of the law, while the latter upheld the law despite the wishes of the government. In the case of Lower Canada, Greenwood argues, a “Baconian” attitude, rooted as it was in the garrison mentality, dominated judicial discourse.<sup>32</sup> Unlike American and British judges, upon whom the French Revolution had a liberalizing affect, judges in Lower Canada, Greenwood believes, took a more authoritarian stance towards suspected traitors. Judicial independence, therefore, did not exist in Lower Canada. Exciting conclusions indeed, but Greenwood does not venture beyond this to determine the broader social and political consequences of these judges’ decisions and their legacy for Québec’s legal system.

In contrast to the formalized legal proceedings of Lower Canada, Christopher English delves into the “official mind” in colonial Newfoundland and how it reacted to popular protest in a similar revolutionary atmosphere. “The Official Mind and Popular Protest in a Revolutionary Era: The Case of Newfoundland, 1789-1819” is a finely crafted piece of scholarship. English has produced a intricately woven tapestry of colonial Newfoundland history which draws upon ethnic and class conflict and the inner workings of a justice system that was in a constant state of flux. Newfoundland courts had at their disposal the jurisdiction of British courts and the authority of English law. But as this chapter reveals, local needs often dictated when and how these powers were used. Thus in one sense the actual reception of British law did not prove to be a defining moment in the legal history of Newfoundland. It is subtle points such as this that the discussion of the historical relevance of reception, as found in the Introduction to this volume, must consider.

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32. “Judges and Treason Law”, *supra* note 25. For a more in-depth look at this issue and security measures in general in Québec during the French Revolution see F.M. Greenwood, *Legacies of Fear: Law and Politics in Québec in the Era of the French Revolution* (Toronto: University of Toronto Press, 1993).

What English has uncovered in Newfoundland from 1789 to 1819, is the law before the “law.” A limited policing power, coupled with the unavailability of a state prosecutor—the result of the constitutional limbo Newfoundland often found itself in—meant that private prosecutions may have been the norm. Moreover, the undeveloped nature of governmental and societal institutions gave state officials a tremendous amount of unhindered power which they did not hesitate to use. Occasionally, English states, this unmitigated use of state power had deadly consequences. Military mutiny, a byproduct of the colony’s uneasy shift from being a migratory outpost for Britain’s fishery to a permanent settlement, was, in the “official mind”—a nebulous concept that clouds the argument—tantamount to treason. This resulted in treason trials and the execution of at least five mutineers.<sup>33</sup>

A form of communal regulation helped to keep Newfoundland from imploding. A night-watch, supplemented by British soldiers, and community self-help, especially when food supplies ran low and widespread hunger struck the colony, prevented rival Irish and British factions from turning against one another or toppling the government. However, this local conception of order and justice, a theme which *Canadian State Trials* needs to stress, could work to the advantage or disadvantage of the disempowered, as is evident in the William Elenes case which opens this review.<sup>34</sup> English’s creative use of evidence and insightful analysis make this a superb article.

Jean-Marie Fecteau, F. Murray Greenwood and Jean-Pierre Wallot shift the focus back to Lower Canada and the “reign of terror” which besieged the colony and its justice system. “Sir James Craig’s ‘Reign of Terror’ and Its Impact on Emergency Powers in Lower Canada, 1810-13” illuminates the constant battle between the French and the English for legal, social and political supremacy in Lower Canada. Governor Craig and officials of his kind in Lower Canada, foreshadowing Lord Durham, wanted to re-make the colony into a full-fledged British state. As a corollary to this, Craig believed that for their own benefit, all French-Canadien residents would have to be assimilated. Otherwise, so Craig felt, the French-Canadien “lower orders” would heed France’s call to arms in an attack upon the colony which seemed to many to be imminent.

To avoid this Craig used the legal authority of his office to clamp down on dissidents. For instance, Craig unlawfully imprisoned members of the

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33. C. English, “The Official Mind and Popular Protest in a Revolutionary Era: The Case of Newfoundland, 1789-1819”, in *State Trials*, *supra* note 1 at 296-322.

34. Louis A. Knafla has argued that there are two levels or concepts of order: the nation-state and the local community. See “Structure, Conjuncture and Event”, *supra* note 17 at 39.

*Parti Canadien* for seditious libel. Craig's replacement, Sir George Prevost (1811-1815), followed in his footsteps. If the situation warranted, Prevost was prepared to declare martial law without the consent of the legislature. For much of the late eighteenth and early nineteenth century, moreover, habeas corpus was suspended. At times this occurred in conjunction with the implementation of martial law. As the authors declare, these practices amounted to an abuse of state powers intended only for use when the judicial system collapsed, something that did not happen in Lower Canada while Craig or Prevost held office.<sup>35</sup> This affront to "British justice" symbolizes the repressive nature of the colonial state. Similarly, it is something that both this article and the entire volume does not utilize to its fullest extent in terms of underlining the competing interpretations, often based on nationalist fervour and ethnic conflict, of justice and order in British North America.

Attacks on civil rights were not confined to Lower Canada. Paul Romney and Barry Wright's "State Trials and Security Proceedings in Upper Canada during the War of 1812" skilfully shows that the law became an interwoven part of social relations and subjected most citizens to the dictates of its mercy. In what is a common theme in this collection, the Upper Canadian government resorted to the expropriation of estates, the cancellation of habeas corpus and treason trials to dispose of those disloyal elements of society (usually Americans) and preserve loyalty amongst the remainder of the population.<sup>36</sup> The deaths of eight men for treason at the hands of the state underscores not only the potency of the law, embodied in the *Sedition Act*<sup>37</sup> of 1804, but also the leverage enjoyed by the legislature to regulate civil liberties. The ability of the law and the state to individualize people and define who is "loyal" or a "criminal," thereby projecting the artificial notion of equality in society, is a central ingredient of the rule of law's legitimacy.<sup>38</sup> Romney and Wright, however, do not discuss what, if any, influence this fact may have had on maintaining the sanctity of the government and the justice system within Upper Canadian society.

"Parliamentary Privilege and the Repression of Dissent in the Canadas" by F. Murray Greenwood and Barry Wright extends the point about state

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35. J. Fecteau, F.M. Greenwood & J. Wallot, "Sir James Craig's 'Reign of Terror' and Its Impact on Emergency Powers in Lower Canada, 1810-13", in *State Trials*, *supra* note 1 at 323-378.

36. P. Romney & B. Wright, "State Trials and Security Proceedings in Upper Canada during the War of 1812", in *State Trials*, *supra* note 1 at 379-405.

37. 44 Geo. III, c. 1 (U.C.).

38. This point is drawn in part from M. Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1979) at 89-90 and 99.



repression into the c.1814 to 1837 period. The authors emphasize that the use of the law for the purposes of security is not confined to the wording of legislation. Socio-economic and political interests often weigh heavily in decisions to arrest or prosecute a suspect. As well, how the law itself is interpreted can determine whether or not someone, by virtue of their words or deeds, has broken the spirit if not the letter of the law. In Upper and Lower Canada, outspoken politicians and newspaper editors came into direct confrontation with the state. William Lyon Mackenzie was expelled four different times from the Upper Canadian House of Assembly for his supposedly subversive views. And each time his constituents re-elected him. By relying upon its parliamentary privilege to eject Mackenzie, the government had exceeded the legal boundaries of its authority.

In Lower Canada the House imprisoned without trial newspaper editors Ludger Duvernay and Daniel Tracey for libel. The government also denied them their right to counsel. According to Greenwood and Wright, this case provoked some of the first serious discussions within patriot circles of political independence and the possible need for rebellion to achieve this goal.<sup>39</sup> These incidents, Greenwood and Wright perceptively argue, exposed the partisan extremes to which colonial governments were willing to go to guarantee domestic security and silence opposition. But what this chapter does not examine is the local context. In returning Mackenzie to office, some residents of Upper Canada resoundingly denounced the government's actions and expressed their general hostility towards corrupt politicians and their undemocratic use of the law. In Lower Canada, the Duvernay/Tracey affair may have been a watershed moment in the coming of the 1837 rebellion, but the fire it ignited had already been smouldering in the colony as the French and English vied for dominance. It was within this setting that the formal and informal law and the power of the state operated in the Canadas and which must serve as the basis for any analysis of this subject and period.

Political misuse of the law and the battleground the legal system represented for the French and the English in Lower Canada comes to light in Evelyn Kolish and James Lambert's "The Attempted Impeachment of Lower Canadian Chief Justices, 1814-15." Judicio-cultural differences, political conflict and ethnic tensions, Kolish and Lambert cogently surmise, had a profound impact on the administration of justice.

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39. F.M. Greenwood & B. Wright, "Parliamentary Privilege and the Repression of Dissent in the Canadas", in *State Trials*, *supra* note 1 at 409-449.

The attempted impeachment of Chief Justices Jonathan Sewell and James Monk arose from this cauldron of mistrust. In addition, by singling out these two judges, reformers hoped to strike a critical blow against the colony's executive power. One of the primary issues in the impeachment charge centred on the allegation that Sewell and Monk had used British rules of practice to amend civil procedure and thus usurped the role of the Lower Canadian legislature. In short, Sewell and Monk were accused of partisan interference in the workings of colonial government.

Both men, echoing the feelings of Governor Craig, saw their actions as a necessary step in the eventual Anglicization of Canadian institutions. Kolish and Lambert indicate that the impeachment proceedings were politically motivated.<sup>40</sup> Moreover, and this is something Kolish and Lambert do not address, these legal wranglings formed an integral part of Lower Canadian political culture. Once the controversy had been fought out in Lower Canada, imperial authorities dismissed the charges against Sewell and Monk. But even in defeat, lessons had been learned on both sides. Contemporaries quickly realized that the law and the judiciary played an important role in the colony's political and constitutional battles. Indeed, for the British, as Kolish and Lambert conclude, the judiciary could not be compromised in any way if they hoped to preserve their political, legal and social ascendancy. For the French, this failed attempt at impeachment reinforced their belief that political reform must first be achieved before meaningful legal reform could occur.

The call for political reform in Upper Canada was also closely tied to debates over the colonial law and system of justice. "The Gourlay Affair: Seditious Libel and the Sedition Act in Upper Canada, 1818-19" by Barry Wright, retraces the state's efforts to silence Robert Gourlay and his measured attacks on what he held to be corrupt and unconstitutional practices on the part of the government. Twice Gourlay was put on trial for seditious libel and twice juries found him innocent. Nevertheless, the Executive Council considered Gourlay to be a seditious alien and ordered him deported. Gourlay defied the order, was thrown in jail and refused bail. Gourlay waited behind bars for eight months before being brought to trial. A stacked jury found him guilty of ignoring the deportation order and Chief Justice Powell instructed Gourlay to leave Upper Canada at once or face a capital charge. Gourlay obliged, but never conceded his guilt and vowed to seek vindication. Wright's article adds a missing piece to the pre-1837 rebellion puzzle in Upper Canada by noting that Gourlay's

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40. E. Kolish and J. Lambert, "The Attempted Impeachment of the Lower Canadian Chief Justices, 1814-15", in *State Trials*, *supra* note 1 at 450-486.

mistreatment “set off a resurgent opposition movement” in the colony.<sup>41</sup> “The Gourlay Affair”, moreover, is a fascinating look at the political and legal culture of Upper Canada. But the actual power exercised by the state in terms of being able to manipulate the law (*Seditious Meetings Act*,<sup>42</sup> 1818), to its own advantage and what that meant for the perceived legitimacy of the government and the judiciary needed to be more fully addressed by Wright.

Paul Romney’s “Upper Canada in the 1820s: Criminal Prosecution and the Case of Francis Collins” picks up where Wright’s study ends. Following Gourlay’s forced exile, the administration of justice in Upper Canada, Romney maintains, became the subject of intense political discontent. Romney uses the libel trial of journalist Francis Collins to illustrate two fundamental points about the law and justice in Upper Canada. First, free speech, which articles by Wright, Bumsted and Cahill also underline, was an embattled and fragile concept during the early decades of the nineteenth century. The law of libel in Upper Canada discountenanced any “calumny and abuse” of the state. Detractors of the law countered that it permitted “calumny and abuse” towards opponents of the government, but refused them the right to reply in kind. Collins, if not Gourlay, was, it seems, victimized by discretionary readings of the laws of libel and sedition for the sake of justice and political expediency.

Secondly, “justice” in Upper Canada, and by extension in Lower Canada and the Atlantic colonies, had multiple meanings. The severe punishment given to Collins (one year in prison and a fine of fifty pounds), which Romney sees as “blatantly repressive” and “vindictive,” pointed out to critics of the government the fate that awaited them if they persisted in publicly airing their grievances.<sup>43</sup> While in one sense “justice” had been served with Collins’ conviction, the neutrality and impartiality of the law had been breached. Indeed, with the colony’s Attorney-General conducting most of the criminal prosecutions for the Crown, the “public interest” often became, as Romney states, sacrificed to the personal interests and designs of the governing elite. Romney stops short, however, of analyzing the class conflict engendered by this case and how it determined some of the actions taken against Collins and the outcome of his trial.

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41. B. Wright, “The Gourlay Affair: Seditious Libel and the Sedition Act in Upper Canada, 1818-19”, in *State Trials*, *supra* note 1 at 487-504.

42. 58 Geo. III, c. 11 (U.C.)

43. P. Romney, “Upper Canada in the 1820s: Criminal Prosecution and the Case of Francis Collins”, in *State Trials*, *supra* note 1 at 505-521.

“Liberty of the Press in Early Prince Edward Island, 1823-9”, by J.M. Bumsted, touches upon the related theme of the public interest and political tampering with legal procedures. As Bumsted indicates, the law concerning libel and contempt remained unclear until 1843 when Britain passed a statute which allowed truth to be used as a defense in such court actions. Subsequently, no two libel trials, or at least the prominent ones, were alike in British North America. With this need to explore legal peculiarities in mind, Bumsted turns his attention to the 1823 and 1829 libel trials of James Douglas Haszard, editor of the *Prince Edward Island Register*. Both cases revolved around the right of a newspaper editor to reprint verbatim, and without editorial comment, such public proceedings as debates from the House of Assembly or transcripts from court cases. This stood in direct opposition to most other libel cases after 1820 which had as their legal focus the editorial commentary, not the proceedings themselves.

The injured parties, acting on their own accord, mounted each of the prosecutions against Haszard. These cases were precedent setting and indicative of some of the interesting legal practices on Prince Edward Island. The first case (*Lane v. Haszard*), was the only one of its kind in British North America to be heard in a Chancery Court. The Island’s Lieutenant Governor, Charles D. Smith (1812-1824), used the Chancery Court for his own personal gain and to counter the influence of the Supreme Court which he felt thwarted justice.<sup>44</sup> In the second case (*Palmer v. Haszard*), the jury found the accused guilty and recommended damages in the amount of “ONE SHILLING.” In reaching this decision the jury, according to Bumsted, exercised a significant principle with regards to the liberty of the press, namely that a jury was ultimately responsible for determining the law and fact in libel cases. Henceforth, newspaper editors could in theory be protected from unlawful prosecution. The impact that the decisions in these cases had on pre-1837 Island politics and the evolution of democracy in Prince Edward Island or across the colonies does not, regrettably, appear in Bumsted’s conclusions.

Joseph Howe would later benefit from the precedent set by *Palmer v. Haszard*. In the last article in *Canadian State Trials*, Barry Cahill’s “*R. v. Howe* (1835) for Seditious Libel: A Tale of Twelve Magistrates”, takes a sober second look at this infamous trial. Nova Scotia, unlike Upper Canada or Britain, never turned to the legal sanctions of the *Sedition Act* to quell political discord. The province instead relied upon the common law to repress foes such as Joseph Howe. When Howe came before the

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44. J.M. Bumsted, “Liberty of the Press in Early Prince Edward Island, 1823-9”, in *State Trials*, *supra* note 1 at 522-546.

Nova Scotia magistrates, in what Cahill calls a “show trial”, to answer to the charge of libel, no perceived difference existed, legal or otherwise, between sedition and the defamation of public officials. This was, for all intents and purposes, a political trial and a concerted assault on Nova Scotia’s political reform movement.<sup>45</sup>

*R. v. Howe* epitomizes the essence of state trials. As Cahill asserts, this trial had nothing to do with the proper administration of criminal justice. Rather, this case was about “official repression and prescribing the outer limits of political dissent.” Howe’s trial displayed one of the central functions of the rule of law: to preserve the appearance of law and order. Howe’s acquittal de-criminalized libel in Nova Scotia. Thereafter, or at least until J.B. McLachlan in 1923, all political libel cases were private, not public prosecutions. While Cahill’s article may not celebrate the outcome of Howe’s trial as a triumph of justice and a victory for democracy and freedom of the press in Nova Scotia, since in many ways it was none of these, it does suggest how state trials represented an abuse of political and judicial power by the government. Where the article falters is in its neglect of the larger context of class and political antagonisms in Nova Scotia that bore directly on the decision to try and acquit Joseph Howe.

The *Canadian State Trials* series is in a position to move into the forefront of legal and criminal justice history in Canada. As these historiographical fields continue to evolve, the State Trials project can serve as a forum to showcase the work of legal, criminal justice and social historians. Before this can happen, however, the problems contained in Volume I, as detailed in this review essay, must be overcome. Most importantly, greater attention to socio-economic context, as evident in the chapter by Christopher English, together with a more sophisticated theoretical discussion of the rule of the law and the state, would have strengthened many of the articles in this volume. This same approach will provide a stable foundation upon which subsequent volumes can build and expand their arguments. As well, a refined definition of what a “state trial” is and the legal issues and arguments surrounding it, would have added clarity to Volume I and solidified the historical relevance of some of the cases contained therein. With this fine-tuning in place, *Canadian State Trials* will be better able to explore the intricacies of the law, how it shaped and was shaped by social relations, and its influence on the social, economic and political development of Canada.

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45. This case was also the first and only public libel prosecution against a newspaper in Nova Scotia’s history. B. Cahill, “*R. v. Howe* (1835) for Seditious Libel: A Tale of Twelve Magistrates”, in *State Trials*, *supra* note 1 at 547-575.